INDUSTRIAL PROPERTY MANAGEMENT SDN BHD v. BIAXIS (M) SDN BHD

HIGH COURT MALAYA, PULAU PINANG
KENNETH ST JAMES JC
[COMPANIES (WINDING-UP) NO: PA-28NCC-16-02-2022]
25 JANUARY 2023

Abstract – *Pursuant to s. 471 of the Companies Act 2016, when a winding-up order is made, no suit could be commenced or continued without the leave of the winding-up court. Two requirements must be fulfilled before the court would grant leave to continue with a suit: (i) the claim could not be adequately dealt with by the winding-up court; and (ii) there is a prima facie case in the suit.*

COMPANY LAW: *Winding up – Leave – Application for leave of court to continue with suit against company – Whether claim could not be adequately dealt with by winding-up court – Whether there was prima facie case in suit – Whether leave ought to be granted – Companies Act 2016, s. 471*

The applicant owned a piece of property with a bungalow thereon. There was a construction project in the neighbouring lot where the respondent was the construction contractor. According to the applicant, the respondent's construction works on the neighbouring lot had caused damages to the applicant's bungalow to the extent that it had become unsafe for occupation. This prompted the applicant to claim for damages against the respondent, premised upon nuisance and negligence, at the High Court ('Suit 644'). While Suit 644 was being prosecuted by the applicant, the respondent was wound up. Therefore, the applicant was compelled to apply for leave of court to continue with Suit 644 against the respondent. Hence, the present application.

Held (dismissing application):

(1) The reliefs and remedies sought for in Suit 644 could be adequately dealt with by this winding-up court. Every prayer in the applicant's statement of claim was for the payment of a monetary sum or for damages. Claims for monetary sums could be dealt with by the proof of debt procedure. The respondent should not be made to spend a substantial amount of its already-constrained funds as legal expenses to continue to defend the applicant's claim in Suit 644, only to end up with a possible outcome that the respondent is ordered to pay the applicant a sum of money. (paras 41 & 42)

(2) The justice of granting leave to the applicant to pursue damages against the respondent in Suit 644 did not outweigh the costs and time required by the respondent to oppose Suit 644; particularly when the costs are

paid out of the assets of the respondent, draining the respondent's already-limited resources. It would not be fair to the respondent's other creditors. Additionally, the *pari passu* principle should be preserved and effected so that there is equal distribution to all the unsecured creditors. If the applicant is given leave to continue with Suit 644, and the presiding court grants judgment for the monetary sums claimed, it would be tantamount to a preference given to the applicant over the other creditors. (paras 52, 57 & 60)

(3) Granting leave, in the circumstances, was inconsistent with the purpose of s. 471 of the Act, which is to stop the commencement or to stay the continuation of any suit against a company that is wound up and in liquidation. (para 60)

Case(s) referred to:
Bruno Phillipe Fehrenbach v. Pegawai Penerima, Malaysia [1999] 6 CLJ 177 HC ***(refd)***
Capita Financial Group Ltd v. Rothwells Ltd (No 2) (1989) 7 ACLC 634 ***(refd)***
Ganda Setia Cemerlang Sdn Bhd & Anor v. Maika Holdings Bhd [2018] 2 CLJ 401 CA ***(refd)***
Malaysian Trustees Bhd v. Transmile Group Bhd & Ors [2012] 3 MLJ 679 ***(refd)***
Mesuntung Property Sdn Bhd v. Kimlin Housing Development Sdn Bhd [2014] 7 CLJ 202 CA ***(refd)***
Mosbert Bhd (In Liquidation) v. Stella D'Cruz [1985] 1 LNS 47 FC ***(refd)***
Vagrand Pty Ltd (in liq) v. Fielding & Ors [1993] 11 ACLC 411 ***(refd)***

Legislation referred to:
Companies Act 2016, s. 471

For the applicant - Chetan Jethwani & Naveenraj Rajendra; M/s Goh Partnership
For the respondent - Teo Jeng Yu; M/s Prem & Assocs

Reported by Najib Tamby

JUDGMENT

Kenneth St James JC:

Prelusion

[1] Kuala Lumpur High Court Civil Suit No: WA-22NCVC-644-10-2020 (Suit 644) is a nuisance and negligence suit.

[2] The plaintiff in Suit 644 (Industrial Property Management: IPM) is the applicant here in this post-winding-up motion for leave. The second defendant in Suit 644 is the respondent company here (Biaxis).

[3] Biaxis is wound up. As Biaxis is wound up, IPM is compelled to apply for the leave of court to continue with Suit 644 against the Biaxis. Section 471 of the Companies Act 2016 (Companies Act) provides for this.

[4] Should IPM be given leave to continue to pursue Suit 644 against Biaxis?

What Is Suit 644 About?

[5] IPM owns Lot 620 in the district of Kuala Lumpur. On Lot 620 is IPM's three-storey bungalow.

[6] In the neighbouring Lot 621, there is a construction project to build a 40-storey tower block that is made up of 90 serviced apartments, a commercial podium, car parks and a basement.

[7] Biaxis was a construction contractor. Biaxis was contracted to perform construction work in the project on Lot 621.

[8] IPM asserts that Biaxis' construction work on Lot 621 caused damage to IPM's bungalow on Lot 620, to the extent that IPM's bungalow has become unsafe for occupation.

[9] IPM sues (i) the owner of Lot 621, (ii) the developer of the project on Lot 621, and (iii) Biaxis (the contractor for the project), for nuisance and negligence.

The Reliefs And Remedies Prayed For In Suit 644

[10] In Suit 644, IPM, as plaintiff, prays for these remedies:

(i) an order that the defendants (which include Biaxis, the second defendant) pay IPM the sum of RM50,000 per month from October 2017 until the bungalow in Lot 620 is rebuilt and fit for occupation;

(ii) RM219,000 for appointing consultants;

(iii) RM153,000 for security services;

(iv) an order that the defendants (which include Biaxis) pay IPM the cost of the security services from October 2017 until the bungalow is rebuilt and fit for occupation;

(v) damages for the cost of reconstruction; and

(vi) general, aggravated and exemplary damages.

[11] IPM's Suit 644 is therefore a purely monetary claim for damages.

The Interrogatories Appeal Arising From Suit 644

[12] There is another proceeding within Suit 644 that is also at issue. It is IPM's application to administer interrogatories on Biaxis. The High Court dismissed IPM's Application to administer interrogatories. IPM appealed to the Court of Appeal (Interrogatories Appeal). The Interrogatories Appeal is pending.

[13] I note here that the Interrogatories proceeding is a procedural tool to progress Suit 644.

[14] I will refer to Suit 644 together with the Interrogatories Appeal, for convenience and in short, as "Suit 644".

The Requirement For Leave

[15] While Suit 644 was being prosecuted by IPM, Biaxis was wound up.

[16] Section 471 of the Companies Act provides that as Biaxis is wound up, IPM needs the leave of court to continue with Suit 644.

First, The Law And Principles On Whether To Grant Leave

[17] Section 471 provides that when a winding-up order is made, no suit can be commenced or continued without the leave of this winding-up court.

[18] Section 471 is set out here for reference:

> **Section 471. Action or proceeding stayed after winding up order**
>
> (1) When a winding up order has been made or an interim liquidator has been appointed, **no action or proceeding shall be proceeded with or commenced against the company except by leave of the Court** and in accordance with such terms as the Court imposes.
>
> (2) The application for leave under subsection (1) shall be made in the Court granting the winding up order and shall be served on the liquidator.
>
> (emphasis added)

[19] IPM must satisfy two requirements before the court will grant leave to continue with Suit 644 and to pursue the Interrogatories Appeal. IPM must demonstrate that:

(i) IPM's claim in Suit 644 cannot be adequately dealt with by this winding-up court; and

(ii) IPM has a *prima facie* case against Biaxis in Suit 644.

[20] This general principle is propounded in *Mesuntung Property Sdn Bhd v. Kimlin Housing Development Sdn Bhd* [2014] 7 CLJ 202; [2014] 4 MLJ 886; [2014] AMEJ 0603. The Court of Appeal, through Justice David Wong Dak Wah JCA (later CJSS), after referring to a series of authorities with approval, held:

> [24] From the above authorities, the appellant (the applicant for leave) has the burden of satisfying the court of two criteria:
>
> (a) The appellant's claim cannot be adequately dealt with by the winding up court.
>
> (b) The appellant has a *prima facie* case against the respondent.
>
> [note added]

[21] But what are the factors that I have to consider when I decide whether IPM has met these two criteria? I can glean the answer from the authorities that the Court of Appeal in *Mesuntung* (*supra*) referred to with approval.

[22] One of the authorities referred to with approval in *Mesuntung* (*supra*) is *Bruno Phillipe Fehrenbach v. Pegawai Penerima, Malaysia* [1999] 6 CLJ 177 (HC). From *Bruno Phillipe* (*supra*), I am guided that the factors that I should consider include; (i) the nature of IPM's claim in Suit 644; (ii) the complexity of the issues involved in Suit 644; (iii) the balance of convenience in granting or not granting IPM the leave to continue with Suit 644; (iv) the justice of the case *ie*, the justice of granting leave as against the justice of not granting leave; (v) the likelihood that IPM will get an advantage over Biaxis' other creditors; (vi) whether any prejudice will be caused to Biaxis' creditors; and (vii) the effects that granting leave will have on the liquidation process.

[23] The Court of Appeal in *Mesuntung* (*supra*) held:

> [20] In *Bruno Phillipe Fehrenbach v. Pegawai Penerima Malaysia* [1999] 6 CLJ 177 Abdul Malik Ishak J held as follows:
>
> > In the context of our s. 226(3) of the Companies Act 1965, leave would readily be given by the court if all the requirements are fulfilled. It is a correct statement of the law to say and I so say that the court considers whether leave to proceed should be granted by looking at *the nature of the plaintiffs claim, the balance of convenience and the justice of the case* (*Re Gordon Grant & Grant Pty Ltd* (*supra*)*; Re Stuart Bros Pty Ltd* [1995] 16 ACSR 451; and *Speiser v. Locums Financial Management Pty Ltd* [1997] 22 ACSR 478 [15 ACLC 278] (SC NSW)). Thus, in a situation *where it is unlikely that the plaintiff will obtain any advantage over the creditors and that no prejudice will be caused either to the creditors or to the orderly winding up of the company, leave will be granted* as a matter of course (*Re Gordon Grant & Grant Pty Ltd* (*supra*); and *Ex p Walker* [1982] 6 ACLR 423). The court in *Re Coastal Constructions Pty Ltd (In Liquidation)* [1994] 13 ACSR 329 in determining whether leave to proceed should be granted was of the view that there was a necessity to examine *the amount and seriousness of the claim, the degree of complexity of the legal and factual issues involved and, lastly, the stage which the proceedings have reached.* It must not be forgotten that *the applicant too must establish that he or she has a prima facie case meaning that the applicant must show that there is a real dispute between the parties* (*Zempilas v. JN Taylor Holdings Ltd (In Prov Liq)* [1991] 3 ACSR 755 (SC SA); and *Vagrand Pty Ltd (In Liq) v. Fielding* [1993] 41 FCR 550 [113 ALR 128]) ...
>
> (emphasis added)

[24] In *Mesuntung* (*supra*), the Court of Appeal also referred to two Australian authorities with approval; (i) *Vagrand Pty Ltd (in liq) v. Fielding & Ors* (1993) 11 ACLC 411; and (ii) *Capita Financial Group Ltd v. Rothwells Ltd (No. 2)* [1989] 7 ACLC 634.

[25] From *Vagrand* (*supra*), I gleaned that I should also consider; (i) the rationale to require an applicant to first obtain leave before they can commence or continue with a suit against a company in liquidation is to protect the company; to safeguard the company from having to deal with and

to finance the intended or existing litigation; (ii) whether it is more convenient or appropriate to grant leave and let Suit 644 to progress to its conclusion; (iii) the effects that Suit 644 will have on Biaxis, particularly the financial effects; and (iv) whether Biaxis' assets will be unnecessarily utilised to pursue Suit 644.

[26] The Court of Appeal in *Mesuntung* (*supra*) held:

> [22] The approach of the Australia jurisdiction can be seen in the following two cases which dealt with the Australia equivalent of s. 226(3) of the Companies Act 1965. In *Vagrand Pty Ltd (in liq) v. Fielding & Ors* [1993] 11 ACLC 411 where the Federal Court of Australia held as follows:
>
> The second matter raised by Mr Coles, in his challenge to the order of Morling J, is the standard applied by his Honour in considering the merits of the case demonstrated by the applicants for leave. After referring to a number of authorities on the point, Morling J said at ACLC 175; ALR 317:
>
> > In summary, in the exercise of its discretion under s. 371(2) the Court should only grant leave to proceed where it is satisfied that a real dispute exists between the parties and *that in light of all the circumstances it is more convenient (or otherwise appropriate) to allow the matter to proceed to judgment*.
>
> *The reason for imposing a requirement of leave*, in the case of litigation against companies in liquidation, was explained a century ago by Manning J, of the New South Wales Supreme Court, in *Thomson v. Mulgoa Irrigation Co Ltd* (1893) 4 BC (NSW)33:
>
> > All that s. 140 means *is that a company in liquidation is not to be harassed and its assets wasted by unnecessary litigation, and the leave of the Court is therefore required as a safeguard. Before any action can be brought or continued against a company, the Court must investigate the intended litigation*.
>
> In *Re Sydney Formworks Pty Ltd (in liquidation)* [1965] NSWR 646 at 649-650 McLelland CJ in Eq expressed the reason for the requirement of leave in this way:
>
> > This view is in keeping with what I consider to be *the obvious intention of the section, namely, to ensure that the assets of the company in liquidation will be administered in accordance with the provisions of the Companies Act and that no person will get an advantage to which, under those provisions, he is not properly entitled, and to enable the Court effectively to supervise all claims brought against the company which is being wound up*. (emphasis added)

[27] From *Capita Financial Group* (*supra*), I similarly learnt that the rationale for requiring leave (particularly for the *prima facie* case criterion for leave) is to shield the wound-up company and its liquidator from the vigour of further litigation, which may end up draining the resources available to the company.

[28] The Court Of Appeal in *Mesuntung* (*supra*) held:

> [23] In *Capita Financial Group Ltd v. Rothwells Ltd (No 2)* [1989] 7 ACLC 634 where Rogers CJ in Comm D said as follows:
>
> > *It is necessary to understand the rationale which buttresses the requirement for showing the existence of a prima facie case. The provisional liquidators and liquidator, respectively, are entitled to be protected from involvement in court proceedings* which may be perhaps only of a nuisance nature, or which may be thought to be totally devoid of any substance. *The resources of the company in liquidation should not be frittered away* in defending baseless claims.
> >
> > It seems to be that it is considerations of this nature which have led the courts uniformly over the years to demand that there be evidence showing a *prima facie* case ...

[29] And what tantamount to a *prima facie* case is, in the view of the Court of Appeal, a case where "there is a serious dispute between the litigants which warrant a trial to determine the truth of the combating allegations": *Mesuntung* (*supra*), at para. 27.

[30] Further, when evaluating whether IPM has a *prima facie* case, I am not to analyse the merits of IPM's case in Suit 644, but to consider IPM's claims to see if they are genuine, or on the other hand, baseless and untenable: *Ganda Setia Cemerlang Sdn Bhd & Anor v. Maika Holdings Bhd* [2018] 2 CLJ 401; [2017] 6 MLJ 661 (CA).

[31] In *Ganda Setia* (*supra*), the Court of Appeal, through Justice Mary Lim JCA (later FCJ), held:

> [43] Again, here, we are reminded of what is required in establishing a *prima facie* case. In *Mesuntung Properties*, it was clearly explained that in the context of s 226(3), what needs to be shown is that there is a serious dispute between the parties that warrants a trial to determine the truth. **The court does not delve into the merits of the dispute but examine the complaints, to see if these complaints are genuine or are they baseless and devoid of any substance**. If the answer is in the affirmative, resources of the respondent ought not to be wasted defending a baseless or frivolous claim. (emphasis added)

[32] Also from *Ganda Setia* (*supra*), I gleaned that when I exercise the discretion whether or not to grant leave, it is a "balancing exercise". I am to look into the "relevant considerations" surrounding Suit 644 as well as the liquidation process. For instance, when the claim is a monetary claim, or when the claim is compensable in monetary terms, then these debts and disputes should be sorted out by the usual procedure of lodging proofs of debt.

[33] The Court of Appeal in *Ganda Setia* (*supra*) held:

> [39] Returning to *Mesuntung Properties*, we agree with the approach enunciated therein. The requirement of leave is necessary to ensure that companies in liquidation and the liquidators of wound up companies are not embroiled in time consuming and expensive litigation which, indirectly will impact on returns to creditors of the wound up company. *Since there is already in place a statutory mechanism for resolving disputes and debts by way of lodgment of proofs of debts, there must be some good, cogent or just reason why there should be a departure from that established procedure. … We can see complexities of legal and factual issues or even the status of proceedings already underway, being other relevant considerations in the weighing in of exercise of discretion. This is the balancing exercise discussed by Abdul Malik Ishak J in Bruno Phillipe that the winding up court will have to weigh when considering whether to exercise judicial discretion to grant or refuse leave to proceed against a company in liquidation. The onus is on the appellants to demonstrate why it is more appropriate in the particular facts and circumstances to proceed by separate civil action instead of by lodgment of a proof of debt*.
>
> (emphasis added)

Has IPM Shown A *Prima Facie* Case In Suit 644?

[34] Since the test for what tantamount to a *prima facie* case is a case where "there is a serious dispute between the litigants which warrant a trial to determine the truth of the combating allegations" *vide Mesuntung* (*supra*), at para. 27, I am of the view that IPM has a *prima facie* case against Biaxis in Suit 644.

[35] Nevertheless, the second of the two criteria that IPM must satisfy, for me to consider if I should grant leave to IPM to continue Suit 644 against Biaxis, is whether IPM's reliefs and remedies in Suit 644 can adequately be dealt with by this winding-up court.

Can The Reliefs And Remedies In Suit 644 Be Adequately Dealt With By This Winding-Up Court?

[36] My starting point is to remind myself of the primary objective of the winding-up process, and the rationale behind the requirement for leave. Both the objective and the rationale are set out in the Supreme Court case of *Mosbert Bhd (In Liquidation) v. Stella D'Cruz* [1985] 1 LNS 47; [1985] 2 MLJ 446.

[37] In *Mosbert* (*supra*), the Supreme Court explained:

> … it cannot be disputed that **the primary object of winding up is the collection and distribution of the assets of the company *pari passu* amongst unsecured creditors after payment of preferential debts**. And the purpose of the statutory provision is to ensure that all claims against the company in liquidation which can be determined by the cheap and

> summary procedure available in a winding up are not made the subject of expensive litigation. The provision is designed to prevent unnecessary multiplicity of suits which may result in dissipating the assets of the company. (emphasis added)

[38] The Court of Appeal in *Ganda Setia* (*supra*), referring to *Mosbert* (*supra*), expounded it further by saying:

> [24] ... Although this has been explained as the availability of remedy test, that if the relief sought can be obtained in the liquidation proceedings through the filing of a proof of debt, leave must be refused, the reasoning for this test must not be overlooked. **At the end of the day, it is what is available for distribution *pari passu* amongst the unsecured creditors of the company that is paramount**. The concerns on costs of expensive litigation including multiple suits litigation are obviously legitimate and not misplaced. (emphasis added)

[39] But I am also mindful, on the authority of *Mesuntung* (*supra*) that I am to consider the twin criteria for leave – whether IPM has a *prima facie* case in Suit 644 and whether the claims in Suit 644 can adequately be dealt with by the winding-up court – purposively.

[40] I must consider the width and depth of the surrounding facts and circumstances, before I apply the governing principles to those facts and circumstances – fundamental principles such as the balance of convenience, and the balance of justice – to achieve a just and fair outcome. At the same time, I am to steadfastly adhere to the principles propounded in *Mesuntung* (*supra*) and *Ganda Setia* (*supra*).

[41] Applying these principles and considering these factors, I find that on the balance, the reliefs and remedies sought for in Suit 644 can be adequately dealt with by this winding-up court. Every prayer in IPM's statement of claim is for the payment of a monetary sum or for damages.

[42] Claims for monetary sums can be dealt with by the proof of debt procedure. Biaxis should not be made to spend a substantial amount of its already-constrained funds as legal expenses to continue to defend IPM's claim in Suit 644, only to end up with a possible outcome that Biaxis is ordered to pay IPM a sum of money.

Pursuing Suit 644 Against The Other Defendants In Suit 644

[43] In Suit 644, in addition to suing Biaxis (the contractor in the project on Lot 621), IPM also sues the owner of the project and the developer of the project.

[44] By the operation of s. 471 of the Companies Act, there is a moratorium over IPM's claim against Biaxis. But IPM can still proceed with Suit 644 as against the other two defendants there. IPM is at liberty to do this, even though Biaxis is now in liquidation.

[45] In this context, IPM argues that it will have to get representatives from Biaxis to testify at the trial of Suit 644. And since Biaxis' representatives are likely to testify anyway, Biaxis might as well be made to defend against Suit 644.

[46] This argument lacks cogency. The costs to have Biaxis' representatives testify at the trial, do not equal the magnitude of the costs that Biaxis will incur to defend against Suit 644 in a trial, as well as to oppose the Interrogatories Appeal.

[47] IPM also argues that if they pursue only the owner and the developer of the project, IPM will be prejudiced. IPM will have to prosecute their claim in Suit 644 against the owner and the developer, and then also and separately take steps to prove Biaxis' debt in the liquidation process. IPM submits that more time and costs will be incurred by them.

[48] Considering this submission, I have to weigh the balance of justice and convenience, in the context of the principles governing leave applications to commence or continue proceedings against a company in liquidation. I find that the consideration of (i) the purpose of liquidation; (ii) the interest of the unsecured creditors; and (iii) such other pertinent factors – outweigh the consideration of the inconvenience and the possible additional costs that IPM faces (if they pursue their claim against the other two tortfeasor-defendants while Biaxis is in liquidation).

The Remedy Of Damages Is Provable In The Liquidation Process

[49] A claim for money, and claims that are compensable by monetary value, are provable in liquidation through the proof of debt process.

[50] IPM's claim is not only primarily but entirely a monetary claim.

[51] Where the prayers are for a monetary sum, I should not grant leave because it can be dealt with in the liquidation process by the lodgement of a proof of debt.

[52] And so, considering the principles and factors that are gleaned from the authorities, as well as the justice of the matter and the balance of convenience, I find that the justice of granting leave to IPM to pursue damages against Biaxis in Suit 644, do not outweigh the cost and time required by Biaxis to oppose Suit 644. Particularly when the costs are paid out of the assets of Biaxis, draining Biaxis' already-limited resources. It would not be fair to Biaxis' other creditors.

The Preservation Of The *Pari Passu* Principle

[53] In the liquidation aspect of company law, the *pari passu* (equal ranking) principle is "paramount". The rights of all unsecured creditors are equal, and must be protected.

[54] The Court of Appeal in *Ganda Setia* (*supra*) propounded:

> [24] ... the primary object of winding up of a company is to collect and distribute 'the assets of the company *pari passu* amongst unsecured creditors after payment of preferential debts'. ... At the end of the day, **it is what is available for distribution *pari passu* amongst the unsecured creditors of the company that is paramount**. The concerns on costs of expensive litigation including multiple suits litigation are obviously legitimate and not misplaced. (emphasis added)

[55] The *pari passu* principle dictates that all Biaxis' unsecured creditors are treated equally in the liquidation process. It is "mandatory" to adhere to the *pari passu* principle.

[56] In *Malaysian Trustees Bhd v. Transmile Group Bhd & Ors* [2012] 3 MLJ 679, the Court of Appeal, through Justice Ramly Ali JCA (later FCJ), enunciated:

> [22] *The pari passu rule is the cornerstone of insolvency law. It is one of the most fundamental principles of the law of liquidation and is at the very heart of the whole statutory scheme of winding up*. It is considered as the most universal of all insolvency principles. It is an old equitable principle that all persons similarly situated are entitled to equality in treatment in the distribution of the assets of the company in the process of liquidation (see *McPherson's Law of Company Liquidation* at para 13.100, at pp 13-1051 and Roy Goode Principles of Corporate Insolvency Law at p 175 para 7.02).
>
> ...
>
> [24] *The pari passu rule is considered as mandatory in its application on the grounds of public policy*. It reflects the principle that statutory provisions for *pro-rata* distribution may not be excluded by a contract which gives one creditor more than its proper share (see *Belmont Park Investments Pty Ltd v. BNY Corporate Trustee Services Ltd And Another* [2011] UKSC 38 - Supreme Court UK and *British Eagle International Airlines Ltd v. Compagnie National Air France* [1975] 2 All ER 390).
>
> (emphasis added)

[57] If IPM is given leave to continue with Suit 644, and the presiding court grants judgment for the monetary sums claimed, it would be tantamount to a preference given to IPM over the other creditors.

[58] I need to consider here whether to allow IPM to pursue an outcome (a monetary judgment) that may run counter to the objective of the *pari passu* principle. And whether permitting IPM to do so will cause Biaxis to incur avoidable cost and time to oppose Suit 644.

Conclusion

[59] I took into account the facts and circumstances surrounding this application. I followed the principles relating to whether to grant leave to IPM to continue to pursue Suit 644. And I considered the factors that weighed on the balance between granting leave and not granting leave.

[60] In the end, I decide not to grant leave. My reasons are as follows:

(i) IPM may appear to have a *prima facie* case in Suit 644, but IPM's claim against Biaxis can be dealt with adequately by this winding-up court. IPM's claim is entirely monetary in nature.

(ii) Biaxis' financial resources should not be further spent to oppose Suit 644.

(iii) I find that the justice of granting leave to IPM to pursue Suit 644, does not outweigh the cost and time required by Biaxis to oppose Suit 644.

(iv) I also find that granting leave in this circumstance is inconsistent with the purpose of s. 471 of the Companies Act 2016, which is to stop the commencement or to stay the continuation of any suit against a company that is wound up and in liquidation.

(v) The *pari passu* principle should be preserved and effected, so that there is equal distribution to all the unsecured creditors.

[61] For these reasons, I dismiss IPM's motion for leave with costs of RM5,000 to be paid by the applicant/IPM to the respondent/Biaxis. Costs are subject to the allocatur.